FEDERAL AVIATION ADMINISTRATION
PAUG-VIK INC., LTD.
STATE OF ALASKA

IBLA 83-959 Decided November 20, 1984

Appeals from a decision by the Alaska State Office, Bureau of Land Management, approving conveyance in part of lands selected under Native village application AA-6680-B while rejecting the application in part and reserving easements.

Affirmed.

1. Alaska Native Claims Settlement Act: Definitions: Public Lands: Generally -- Alaska Native Claims Settlement Act: Native Land Selections: Selection Limitations

"Public lands" available for selection by a Native village corporation under the Alaska Native Claims Settlement Act do not include the smallest practicable tract of land actually used by a Federal agency in connection with the administration of an installation or facility. 43 U.S.C. § 1602(e) (1982). Although such land need not necessarily be improved on Dec. 18, 1971, the land must be in actual use on that date and throughout the selection period. Land which is the subject of planning or which is held for future use does not qualify and, hence, is available for selection.

2. Alaska Native Claims Settlement Act: Definitions: Public Lands: Generally -- Alaska Native Claims Settlement Act: Native Land Selections: Selection Limitations

The status of a withdrawal of public domain is not dispositive of the question of whether Federal lands are actually used in connection with the administration of a Federal installation and, thus, not available for Native selection under sec. 3(e) of the Alaska Native Claims Settlement Act.

3. Alaska Native Claims Settlement Act: Conveyances: Easements -- Alaska Native Claims Settlement Act: Easements: Access -- Alaska Native Claims Settlement Act: Easements: Public Easements

Sec. 17(b) of the Alaska Native Claims Settlement Act requires the Secretary, when approving a selection of lands by a Native corporation, to reserve such easements as are reasonably necessary to guarantee a full right of public access across selected lands to public lands not embraced in the selection. Reservation of an easement for a road noted on the public land records pursuant to Instructions, 44 L.D. 513 (1916), will not be disturbed in the absence of a showing that it is either unnecessary or inadequate to preserve access to the public lands not selected.

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OPINION BY ADMINISTRATIVE JUDGE GRANT

The Federal Aviation Administration (FAA), Paug-Vik Inc., Ltd. (Paug-Vik), and the State of Alaska appeal separately from an August 5, 1983, decision of the Alaska State Office, Bureau of Land Management (BLM), approving conveyance under Native village corporation selection application AA-6680-B of certain lands within an air navigation site withdrawal. The decision also rejected the application in part and reserved easements on the land. 1/

This case involves land located within secs. 15 and 22, T. 17 S., R. 45 W., Seward Meridian, which was originally part of Air Navigation Site (ANS) 169, a public land withdrawal effective October 15, 1941, for air navigation facilities associated with the King Salmon Airport. 2/ Air navigation equipment has been located on portions of secs. 15 and 22 since 1944. Beginning in 1963, FAA initiated plans to build housing facilities on some

1/ Paug-Vik Inc., Ltd., is the Native corporation established for the village of Naknek. FAA is an agency within the U.S. Department of Transportation. The State of Alaska is involved through its agency designated Department of Transportation and Public Facilities.

2/ Air Navigation Site No. 169 (ANS 169) originally withdrew 1,340 acres at Naknek, Alaska (King Salmon Airport), for the Department of Commerce for maintenance of air navigation facilities. Later amendments either enlarged or reduced ANS 169 for use by other Federal agencies. A final amendment placed the lands under the jurisdiction of the Civil Aeronautics Administration, the predecessor to FAA.

of the subject lands within ANS 169 for use by its employees. Funds were appropriated for the project in 1972 and construction commenced in 1974 on a portion of sec. 22 designated by FAA as the West Quarters Housing Area. 3/

Section 11(a)(1) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1610(a)(1) (1982), withdrew "public lands" in townships enclosing certain identified Native villages and certain townships contiguous or proximate thereto from appropriation under the public land laws on December 18, 1971. These "public lands" were made available for selection by the Native corporation for the village under section 12(a) of ANCSA, as amended, 43 U.S.C. § 1611(a) (1982). In order to satisfy the statutory entitlement for the village of Naknek, it was necessary for Paug-Vik to select the available public lands in T. 17 S., R. 45 W., Seward Meridian. 43 U.S.C. § 1611(a) (1982). On December 4, 1974, Paug-Vik filed selection application AA-6680-B, as amended, under the provisions of sec-tion 12 of ANCSA, 43 U.S.C. § 1611 (1982), for the surface estate of lands in the vicinity of Naknek, including unpatented lands in secs. 15 and 22.

Under section 3(e) of ANCSA, 43 U.S.C. § 1602(e) (1982), "public lands" available for ANCSA selection include "all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation * * *." (Emphasis added.) Thus, the issue raised by the cross appeals of Paug-Vik and FAA is whether certain lands described in the application are ineligible for selection by reason of actual use in connection with a Federal installation.

On February 16, 1976, BLM requested that FAA furnish justification for retention of lands within ANS withdrawal No. 169 under the section 3(e)(1) exclusion. FAA responded on April 7, 1976, with a formal notice of its intent to relinquish portions of ANS 169 in accordance with the requirements of 43 CFR 2372.1. 4/ While no particular land within secs. 15 and 22 of T. 17 S., R. 45 W., Seward Meridian, was designated for relinquishment, the following land was indicated by FAA as desired for retention:

Sec. 15: W 1/2 SW 1/4 SE 1/4, SE 1/4 SW 1/4 SE 1/4,
E 1/2 SE 1/4 SW 1/4

Sec. 22: Lots 1, 2, 3, and 4, NE 1/4 SW 1/4, NW 1/4
SE 1/4, W 1/2 NE 1/4, E 1/2 NW 1/4, S 1/2
NW 1/4 NW 1/4, NE 1/4 NW 1/4 NW 1/4

Sec. 25: NE 1/4

3/ Improvements on the West Quarters Housing Area consist of 9 three- bedroom dwellings used as employee housing. This development is purported to represent a million dollar-plus investment for the United States.

4/ The regulations at 43 CFR Subpart 2372 provide general procedures under which agencies holding lands withdrawn or reserved from the public domain for their use can relinquish the lands for restoration to the public domain.

T. 17 S., R. 45 W., Seward Meridian, 598.79 acres more or less.

Subsequent notice of intent to relinquish land, dated March 10, 1978, was received by BLM for the following lands:

Sec. 22: NE 1/4 NW 1/4 NW 1/4, S 1/2 NW 1/4 NW 1/4, Lot 1, that portion lying Northwest of King Salmon Creek, Lot 2, that portion lying Northwest of King Salmon Creek.

T. 17 S., R. 45 W., S.M., 65 acres more or less.

On August 12, 1981, a notice of intent to relinquish was filed describing the following lands:

Sec. 15: E 1/2 SE 1/4 SW 1/4, SW 1/4 SE 1/4
Sec. 22: Portion of NE 1/4 NW 1/4 and NW 1/4 NE 1/4 lying north of Naknek road

T. 17 S., R. 45 W., S.M., 84 acres more or less.

On February 10, 1982, FAA requested that the following lands be deleted from its prior notices of intent to relinquish:

Sec. 15: SW 1/4 SW 1/4 SE 1/4, E 1/2 SE 1/4 SE 1/4 SW 1/4

Sec. 22: NE 1/4 NW 1/4 NW 1/4, S 1/2 NW 1/4 NW 1/4, all lands lying north of the Naknek road in NE 1/4 NW 1/4 and NW 1/4 NE 1/4

T. 17 S., R. 45 W., SM, containing 69 acres more or less.

The request asserted that the lands have been in use by the Government.

Prior to 1980, the Department lacked published procedures governing section 3(e) determinations under ANCSA. 43 CFR Subpart 2655 was promulgated effective November 21, 1980, to implement the provisions of section 3(e) of ANCSA. This set of regulatory procedures establishes the process for determining which lands held by Federal agencies were in actual use at the time of enactment of ANCSA and which lands will be conveyed to Native corporations under the Act. See 45 FR 70204 (Oct. 22, 1980).

In a notice dated February 5, 1981, BLM requested FAA to supply relevant information under 43 CFR Subpart 2655 for a section 3(e) determination regarding those lands held by FAA in secs. 15 and 22. This review was serialized as application AA-41878 for FAA. On April 2, 1981, FAA responded by declaring the following lands as necessary for retention:

Sec. 15: E 1/2 SE 1/4 SW 1/4, W 1/2 SW 1/4 SE 1/4

Sec. 22: Portion of Lot 1 which lies east of King Salmon Creek, Lots 2 through 4, E 1/2 NW 1/4, W 1/2 NE 1/4, NE 1/4 SW 1/4, S 1/2 S 1/2 NW 1/4 SE 1/4

T. 17 S., R. 45 W., S.M., containing approximately 324.79 acres.

After reviewing FAA's submission, BLM made a preliminary determination on August 25, 1982, 5/ that the following lands were not "public lands" under the provisions of ANCSA, i.e., were the smallest practicable tract enclosing land actually used in connection with the FAA facilities at King Salmon Creek:

T. 17 S., R. 45 W., S.M.

Sec. 15: SW 1/4 SW 1/4 SE 1/4, E 1/2 SE 1/4 SE 1/4 SW 1/4
Sec. 22: NW 1/4 NE 1/4, N 1/2 SW 1/4 NE 1/4, NE 1/4 NW 1/4, S 1/2 NW 1/4 NW 1/4

Containing 135 acres.

The BLM memorandum recommended rejection of Paug-Vik's selection of these lands. Further, the preliminary determination also recommended conveyance of the following lands to Paug-Vik under selection application AA-6680-B:

T. 17 S., R. 45 W., S.M.

Sec. 15: E 1/2 NE 1/4 SE 1/4 SW 1/4, W 1/2 E 1/2 SE 1/4 SW 1/4, E 1/2 W 1/2 SE 1/4 SW 1/4, NW 1/4 SW 1/4 SE 1/4

Sec. 22: Lots 1 through 4, inclusive, S 1/2 SW 1/4 NE 1/4, N 1/2 NW 1/4 NW 1/4, SE 1/4 NW 1/4, NE 1/4 SW 1/4, S 1/2 S 1/2 NW 1/4 SE 1/4

Containing 264.79 acres.

The acreage computation for the land described was subsequently amended to 274.69 acres by memorandum of October 1, 1982. These preliminary conclusions appear virtually unaltered in the August 5, 1983, decision appealed from. The decision also reserves two easements, including a 60-foot transportation easement designated EIN 35 K, the latter being the subject of the appeal by the State of Alaska.

We now will review separately the respective appeals.

FAA Appeal

In its statement of reasons, FAA disputes BLM's determination that its West Quarters Housing Area is "public land" to be conveyed to Paug-Vik. It argues that BLM erred in:

5/ BLM's preliminary findings were disclosed in an Aug. 25, 1982, memorandum to the Chief, Division of ANCSA and State Conveyances from the Assistant to the State Director for Conveyance Management.

1. disregard[ing] the established legal principles of statutory construction which require a contrary conclusion;

2. fail[ing] to comply with the expressed provisions and intent of section 3(e) and of the regulations in 43 Subpart 2655 as to the meaning of "actual use of lands by the FAA";

3. fail[ing] to comply with [the] terms of its own regulations and adopt[ing] a determination of facts not supported by any reasonable interpretation of evidence in its record file;

4. [giving] an unwarranted retroactive effect to the regulations promulgated on November 21, 1980, to implement section 3(e) by requiring proof of factual material prior to December 18, 1971, which is unavailable; and

5. failing to comply with the applicable requirements of the Administrative Procedure Act (APA) and [rendering] a decision which is arbitrary and capricious and not in accordance with law.

The basic issue in FAA's appeal is whether BLM erroneously determined that the lands in the West Quarters Housing Area are public lands not excluded from conveyance to Paug-Vik. In support of its arguments, FAA asserts that its proferred evidence establishes the following sequence of events:

(1) during 1967, planning was directed by the FAA for a development plan within the King Salmon area which included additional housing for facility personnel. A completed development proposal was submitted for Regional approval.

(2) during 1968, the Director, Alaskan Region, FAA, approved the location and development of FAA housing in the West Quarters Area, and implementing procedures were commenced.

(3) continuously from 1968, the required administrative procedures were pursued within the various departments of the Alaskan Region, FAA, to implement attaining of this approved housing on the lands in question, including the establishment of budgeting and project priority.

(4) in January, 1971, after the completion of administrative action and approval by the Alaskan Region, FAA, the formal budgetary request was made (FY-1973) to the DOT for submission to Congress for funding appropriation.

(5) on April 18, 1972, the subcommittee of the House Committee on Appropriations [considered] the DOT FY-1973 budgetary request, including the construction of the West Quarter Area Housing Project at King Salmon, and on May 15, 1972, the request[ed] appropriation was included in HR 15097.

(6) Public Law 92-398, dated August 22, 1972, which is the FY-1973 appropriations for the DOT, includes approval of funding by Congress for the construction of the King Salmon housing on the lands in question.

(7) in August and September 1972, documentation of congressional approval and appropriation was forwarded to Alaskan Region, FAA, for preconstruction processing and construction.

(8) the structures were constructed on the lands in question and occupied by King Salmon facility personnel during the summer and fall of 1974.

[1] FAA refers to the terms of both ANCSA and the Act of August 22, 1972, P.L. 92-398, 86 Stat. 580, in an effort to establish its challenge to BLM's decision. Specifically, FAA contends that the deletion of the word "improved," found in the original proposal for ANCSA, from the adopted provision of section 3(e) was a significant change indicative of an intent to recognize a variety of activities as sufficient to support retention of selected land. Moreover, it argues that ANCSA and the funding statute, P.L. 92-398, are in pari materia and, when interpreted in light of each other, the reasonable conclusion is to give controlling weight to the congressional appropriation of funds for construction of housing at King Salmon made subsequent to the enactment of ANCSA.

The definition of "public lands" in both the Senate and House bills precedent to ANCSA clearly limited BLM's determination of a Federal agency's entitlement to improved lands actually used. 6/ The conference report deleted the word "improved" in the enacted version without a recorded explanation for this change. FAA argues that this is significant and indicative of an intent by Congress to include preconstruction activities which directly involve the subject lands.

FAA's argument misses the mark because the real issue is not whether the land in question was unimproved, on December 18, 1971, but whether the land was in actual use. Indeed, BLM may approve retention of unimproved land provided it is actually used by a Federal agency on a continuing basis

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6/ The pertinent portion of H.R. 10367 read: "'[P]ublic land' means all Federal land and interests therein situated in Alaska except (1) any improved land used in connection with the administration of any federal installation * * *." (Emphasis added.) See H.R. Rep. No. 523, 92d Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Ad. News 2192, 2221.

S. 35 provided the following definition:

"'[P]ublic lands' means all Federal lands and interests therein situated in Alaska as of the effective date of this Act, except: (1) the smallest practicable tract (but not less than forty acres), as determined by the Secretary, enclosing improved land actually used in connection with the administration of any Federal installation * * *." (Emphasis added.) See S. Rep. No. 405, 92d Cong., 1st Sess. (1971).

from December 18, 1971, until the date of Native selection. See 43 CFR 2655.2(b)(3) (e.g., buffer zones, storage lots, material sources). The definitions of the terms "actual" and "use" make it evident that future plans were not within the scope of the exclusion intended by Congress. "Actual" means "real" or "existing presently" as opposed to "conceivable," "possible," "constructive," or "speculative." See Black's Law Dictionary (Black's) 53 (4th ed. 1968); Webster's Third New International Dictionary (Webster's) 22 (1966 ed.). "Use" means the application or employment of something for some purpose. See Black's, supra at 1710. By comparison, "plan" is a proposed or tentative project, an intention. See Webster's, supra at 1729. If planning is included within the definition of actual use, the special definition in section 3(e) created by Congress is rendered meaningless. In Appeal of Paug-Vik Inc., 5 ANCAB 59, 87 I.D. 422 (1980), the Alaska Native Claims Appeal Board (ANCAB) 7/ construed the special definition in section 3(e) as follows:

> The definition in § 3(e) encompasses lands which are not subject to disposal under the general land laws, because they are reserved for government use. [Emphasis in original.] The expanded definition in § 3(e) makes reserved Federal land "public land" and therefore available for Native selection if not being actually used by a Federal agency. This broad definition in § 3(e) operates only to make land available for conveyance to Native corporations under ANCSA, it does not operate to make lands available for disposal under the general public land laws. [Emphasis added.]

Id. at 65, 87 I.D. at 425. Planning simply does not constitute actual use.

With respect to FAA's argument regarding construction of the statutes as in pari materia, we are not persuaded that the two statutes are related closely enough in objective or purpose to justify interpreting one in light of the other. See 2A C. Sands, Sutherland Statutory Construction, § 51.03 (4th ed. 1973). P.L. 92-398, 86 Stat. 580, is an Act "[m]aking appropriation for the Department of Transportation and related agencies for the fiscal year ending June 30, 1973, and for other purposes." Included in the many appropriations embraced in the Act is the "construction and furnishing of quarters and related accommodations for officers and employees of the Federal Aviation Administration stationed at remote localities where such accommodations are not available but at a total cost of construction not to exceed $50,000 per housing unit in Alaska." 86 Stat. at 583. The Act has no bearing on the settlement of the claims of Alaska Natives or the land used by a Federal agency as of December 18, 1971, to be excepted from Native selection. It is unreasonable to assert that Congress in passing a Department of Transportation appropriation bill including funding for construction of housing by FAA for its employees contemplated settlement of Native rights in the lands at issue under section 3(e) of ANCSA. We find that ANCSA and P.L. 92-398

7/ The Board of Land Appeals assumed the functions and responsibilities of ANCAB effective June 30, 1982. 43 FR 26390 (June 18, 1982).

involve neither the same subject matter nor the same purpose and, there-fore, it is inappropriate to construe section 3(e) in light of P.L. 92-398.

Contrary to FAA's contention, we find that BLM complied with the provisions and intent of Departmental regulations. The applicable regulations, 43 CFR Subpart 2655, include criteria for a determination of the smallest practicable site used in accordance with section 3(e). 43 CFR 2655.2, in particular, provides that BLM shall determine:

> (a) Nature and time of use.
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> (1) If the holding agency used the lands for a purpose directly and necessarily connected with the Federal agency as of December 18, 1971; and
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> (2) If use was continuous, taking into account the type of use throughout the appropriate selection period.

The comments accompanying publication of the proposed and final versions of the rules at 43 CFR Subpart 2655 make it clear that the intent of the regulations is to require actual use as of December 18, 1971. When public comments were solicited with respect to the proposed rulemaking for Subpart 2655, BLM included the following invitation: "Public comments are specifically requested whether the use of the term 'actually used' in the definition should include land assets held by an agency as of December 18, 1971, to meet reasonable and prudent future needs in implementing its mission as established by law." 44 FR 54254 (Sept. 18, 1979). When final rulemaking was published, the following explanation appeared:

> [T]herefore the final rulemaking has been redrafted to reflect the three criteria which the Bureau of Land Management will use in order to make a 3(e) determination as to whether the lands are public lands and, thus, subject to conveyance to a Native corporation. These criteria, which were previously reflected but not expressly stated in the definitions section are: (1) Nature and time of use * * *
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> (1) Nature and time of use. This criterion derives from § 2655.0-5(a)(1) in the proposed rulemaking and sets out three provisions. The first is that the use must be for a purpose "directly and necessarily connected with a Federal agency as of December 18, 1971."
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> The second provision is that the activity must be continuous, depending on the type of use, throughout the appropriate selection period. Two aspects of this provision need to be addressed. The final rulemaking provides that use by the agency

> during the entire selection period is necessary in order for the lands to be exempt from Native selection. This provision represents a compromise [8/] between those comments which favored establishing each agency's use solely on the basis of use on December 18, 1971, and those comments which expressed the view that use at any time during the appropriate selection period and, in some cases, proposed or future use should make the lands subject to retention by the agency. The provision that use should be continuous, considering the type of use, reflects this compromise.

45 FR 70204-05 (Oct. 22, 1980). Thus, the final rulemaking excluded planning and future needs as a use which would entitle a Federal agency to a section 3(e) exclusion from conveyance. Moreover, it is explicit that the qualifying use must be continuous through the selection period. 9/

FAA clearly made no actual use of the West Quarters Housing Area as of December 18, 1971. The tentative project had not received final approval from FAA's headquarters. No actual funds had been appropriated. When the relevant appropriations bill, P.L. 92-398, was passed, the sites targeted for construction were still unspecified. Not until construction in 1974 were the lands committed to use for a Federal facility.

Because the structures of the West Quarters Housing Area were not built until 1974 and the land was otherwise not in use prior to that date, FAA urges the Board to expand its definition of "actual use" to include pre-construction planning and other activities which did not constitute use of the lands. The principal focus of any section 3(e) determination is whether the land under review was in actual use on December 18, 1971. BLM found, after a review of the submitted evidence, that FAA was not actually using the land as of that date. BLM properly determined, consistent with the statute and the regulations, that planning for a proposed Federal facility does not constitute an actual use of the lands.

Paug-Vik Appeal

Paug-Vik's statement of reasons appears in three parts. First, it asserts entitlement to the 20 acres of the S 1/2 NW 1/4 NW 1/4 sec. 22 because the parcel was relinquished by FAA without a subsequent waiver of its notice of intent to relinquish. Second, it contends that comments and

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8/ Although use of the term "compromise" may be a misnomer in this context, the commentary confirms the intent of the regulation to require use both as of Dec. 18, 1971, and thereafter throughout the selection period.

9/ We find that this is consistent with the Board's decision in Ukpeagvik Inupiat Corp., 81 IBLA 222 (1984). There the Board found that the regulations under section 3(e) of ANCSA "had the effect of limiting the Federal agency to use actually occurring within the appropriate selection period." 81 IBLA at 227. We believe that the statute and the regulations promulgated thereunder expressly require that a qualifying use be in existence as of Dec. 18, 1981, and continuously throughout the selection period.

information untimely submitted by FAA cannot be considered under the procedures delineated in 43 CFR 2655.3 and 2655.4. Last, it argues that FAA has failed in its burden to prove a valid section 3(e) claim for all the land awarded in the appealed decision.

[2] With respect to the relinquishment of the 20-acre tract by FAA which was subsequently rescinded, it must be recognized that such a relinquishment must be accepted by BLM before it becomes effective to restore the withdrawn land to the public domain. See 43 CFR 2372.3; 43 CFR Subpart 2374. The relinquishment of the tract dated March 10, 1978, was rescinded by notice of February 10, 1982. The letter appearing in the case file dated May 14, 1982, from BLM to FAA makes it clear that as of that date the relinquishment had not been accepted by BLM. More significantly, for purposes of an ANCSA section 3(e) determination the question is not whether the lands are in a withdrawn status as the statutory definition of public lands makes this irrelevant. 43 U.S.C. § 1602(e) (1982); see Appeal of Paug-Vik Inc., supra. Rather, as discussed above, the issue is whether the land was actually used by a Federal agency as of December 18, 1971, and through the selection period.

Paug-Vik asserts that contrary to the guidelines in 43 CFR 2655.3 and 2655.4, FAA was allowed to submit evidence relevant to its use of the lands under review for a section 3(e) determination after the designated time limit had expired. In the case of a record insufficient to enable an informed judgment regarding a section 3(e) determination, the procedures in section 2655.3 provide that the Federal agency believed to be the holding agency will be given notice and 90 days to respond by submitting the necessary information. The burden of proof is on such agency to demonstrate to the decisionmaker's satisfaction what land was in actual use and, unless adequate information is received, all of the agency's lands which have been selected under ANCSA will be conveyed to the Native corporation. 43 CFR 265.3(d). To assist the agency in its efforts to compile adequate justification for retention, section 2655.3 lists the information BLM seeks for its review. Further, BLM has the discretion to grant a 60-day extension for an agency to comply with the request for justification. BLM's section 3(e) determination is incorporated into a decision which becomes final for the Department unless appealed to this Board. 43 CFR 2655.4(a).

BLM's notice of section 3(e) review was received by FAA on February 12, 1981; FAA's comments were submitted to BLM on April 7, 1981; and Paug-Vik responded to FAA's comments on November 13, 1981. BLM then rendered a preliminary section 3(e) determination on August 25, 1982. FAA subsequently requested additional time to submit documentation and materials pertinent to the section 3(e) review. BLM informed FAA on March 11, 1983, that its material would be accepted as part of the file. BLM's reluctance to consider any additional information at that time was apparently due to the time limits found in 43 CFR 2655.3.

On March 14 and April 8, 1983, FAA submitted extensive documentation evidencing its use of the lands in review. Paug-Vik argues that since those materials were filed after both the initial 90-day period and the 60-day extension period, all of it must be rejected and the case decided without its consideration.

The eventual decision, rendered after the supplemental material was received, did not vary from the conclusions reached by BLM on August 25, 1982. However, Paug-Vik claims that without the material submitted in March and April 1983, FAA has not evidenced a continuous use of the land recommended for retention under the section 3(e) review. It further argues that the comments received in April 1981 did not satisfy the criteria listed in 43 CFR 2655.3(b).

An application of the regulations to effect a default as suggested by Paug-Vik would deprive FAA of the lands actually used on December 18, 1971, contrary to the intent of Congress. 43 CFR 2655.2 establishes the actual criteria to be applied when determining whether the lands in review are public lands available for conveyance under ANCSA, while 43 CFR 2655.3 is merely a method to request agencies to supply information sufficient to enable BLM to render its determination. The critical issue in a section 3(e) determination is not whether the procedures in section 2655.3 were strictly applied prior to the determination, but whether the land has been sufficiently identified with respect to the relevant criteria for retention by the appropriate agency. The procedures delineated in section 2655.3 are designed to facilitate the section 3(e) determination. However, no sanctions are provided for failure to comply with the time limits except for the risk of an adverse determination. A proper decision having a rational basis must be supported by the information in the record regardless of its origin. Such information would include that which is received and made available to the decisionmaker before the section 3(e) determination is rendered. Moreover, any initial adjudicatory decision is not final, but is subject to modification upon appeal. During such appeal, any evidence concerning actual use during the selection period may be considered. In re Lick Gulch Timber Sale, 72 IBLA 261, 272 n.6, 90 I.D. 189, 196 n.6 (1983); Benton C. Cavin, 83 IBLA 107, 114-15 (1984). Therefore, the determination will not be arbitrarily restricted to evidence of use received within the designated time limits.

A section 3(e) determination identifies land actually used by a Federal agency during the appropriate selection period. FAA's April 1981 submission states in relevant part:

> 2. The lands to be segregated from the Native Land Selection are used for the operation and maintenance of Remote Receiver Facility (RTR), Directional Finder (DF), H-Marker, Communications Link Terminal (CMLT), and Housing Quarters Complex. The RTR, DF, H-Marker, CMLT, and supporting facilities are used as Air Navigational Aids (NAVAIDS) which provide guidance to pilots of aircraft for air traffic flying within the vicinity of King Salmon and approaches to the King Salmon Airport. The housing complex is used to shelter Federal Aviation Administration (FAA) employees stationed in King Salmon.
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> 4. The facilities located on the land were installed by this agency as follows:

RTR - 1950 at a cost of	$40,800.00
DF - 1968 at a cost of	$2,658.00
H-Marker - 1944 at a cost of	$203,745.00
CMLT - 1944 at a cost of	$35,779.00
Housing Complex and Supporting facilities	$3,045,342.00

5. The use of the withdrawn lands began in 1942 and were used as of December 18, 1971, for installation and operation of NAVAIDS with associated equipment and facilities. The land is currently being used and planned for the continued operation of directional aids for air traffic.

6. This agency has not granted any rights or other interests in the withdrawn land.

7. The facilities installed and located on the lands are:

Remote Receiver Facility, Directional Finder, H-Marker, Communications Link Terminal, and Housing Quarters with the following associated supporting facilities used in the maintenance, security, and operations of the NAVAID system:

Electric distribution system, fuel storage tanks system, equipment shops and power house, water and sewage distribution system, access roads and vehicle parking areas.

8. The lands currently being used by our agency are the minimum lands required for maintenance, control, operation and protection of facilities and equipment installed by the Government in the King Salmon area.

The information supplied by FAA was sufficient to allow BLM to determine that a 135-acre parcel was actually used by FAA throughout the selection period. Although the material supplied by FAA may not have included all the details listed under section 2655.3(b), the information necessary to support a favorable section 3(e) determination as specified in section 2655.2 is found in the record. The regulations clearly suggest an element of discretion on the part of BLM as to the sufficiency of detail required in the record to support a section 3(e) determination. See 43 CFR 2655.3(a); 44 FR 54254 (Sept. 18, 1979). We have reviewed Paug-Vik's November 13, 1981, response to BLM commenting on the lands requested by FAA for section 3(e) retention as well as the statement of reasons for appeal. Appellant has not presented any evidence to challenge the BLM determination that the 135-acre parcel was used by FAA on December 18, 1971, and through the selection period.

Although reference is made to a statement by an FAA official in October 1981 that certain "NAVAIDS" had been removed from the land by that time, the dispositive issue in a section 3(e) determination is use of the land during the selection period and not thereafter. Ukpeagvik Inupiat Corp., 81 IBLA 222 (1984). After review of the evidence on record, we affirm BLM's decision regarding retention of the 135-acre parcel disputed by Paug-Vik.

State of Alaska Appeal

The State of Alaska has appealed from the portion of the decision which reserves an easement identified as EIN 35 K pursuant to section 17(b) of ANCSA, P.L. 92-203, 85 Stat. 708 (formerly codified at 43 U.S.C. § 1616(b) (1976)). The State alleges that the public easement "may" cross its patented lands containing the King Salmon airport. The easement is described in the reservation as follows:

> An easement sixty (60) feet in width for an existing road from the barge landing site in lot 2, U.S. Survey No. 3177, northeasterly to the U.S. Air Force POL Tank Farm (Parcel 2) located in the NW 1/4 SE 1/4 of Sec. 22, T. 17 S., R. 45 W., Seward Meridian. The uses allowed are those listed above for a sixty (60) foot wide road easement.

The State claims that "[t]here are several roads on the ground between those two locations, some of which cross the airport." It argues that, because BLM has refused to specify which existing road would be the easement, it must appeal to protect its patented property. The State asserts that the decision improperly purported to reserve an easement across private lands. It expresses concern over interference with its operation of the airport and the risk of a safety hazard. Further, the State contends that BLM has an obligation to route easements for public access around private inholdings to the extent feasible.

[3] The subject easement is referred to as follows in an October 1, 1982, memorandum amending the August 25, 1982, memorandum referenced previously:

Discussion:

> The road (AA-2839, Road 1) has a 44 L.D. 513 notation on the Bureau of Land Management's status plats. This notation is from a request by the Corps of Engineers, in 1968, on behalf of the U.S. Air Force. It has been in continuous use since 1968 and provides access from the barge loading site to the POL Tank Farm.

The copy in the record of the master title plat for sec. 22, T. 17 S., R. 45 W., Seward Meridian, validated current to August 25, 1983, contains the following notation: AA-2839, R/W AF 50', Rd. 1. This right-of-way was noted to the public records on June 26, 1968, under the provisions of Instructions, 44 L.D. 513 (1916), to protect the interests of the Air Force should FAA release the lands from ANS 169. 10/ Access Road 1, AA-2839, is described as follows:

10/ The purpose of a 44 L.D. 513 notation was to provide notice on public record of an authorized Government improvement in order that such improvement would be excepted from any ensuing patent or conveyance of the underlying public land. Neither the notation nor the improvement affected the status of the land. Only an authorized improvement constructed and maintained under

Commencing at Corner No. 3 of U.S.S. 3177; thence S. 77 degrees 05' W. along said survey line for a distance of 190 feet, more or less, to a point on the centerline of an existing road, said point being the Point of Beginning for this description; thence, following the centerline of said road, N. 29 degrees 30' E. for a distance of 475 feet, more or less, to a point on the east 1/16 line of Section 22, T. 17 S., R. 45 W., S.M.

Containing 1.09 acres, more or less.

The record including the survey plat shows that Access Road 1 is confined to the public land in lot 4 and S 1/2 S 1/2 NW 1/4 SE 1/4 sec. 22, approved for conveyance to Paug-Vik by the decision at issue here. The northeast endpoint of Road 1, AA-2839, appears to be the boundary between the public land tract conveyed to Paug-Vik and the land depicted on the survey plat as conveyed by quitclaim deed to the State of Alaska, designated AA-5454.

Road 1, AA-2839, appears to correspond with a segment of an existing road shown on several maps and aerial photographs included in the record. This road begins in lot 2, U.S. Survey No. 3177, heads northeasterly, traversing public land and State land until it intersects with the King Salmon-Naknek Road. Another road, which originates in the POL Tank Farm parcel, intersects the first road at a point on the State's land.

The State acquired title to the E 1/2 E 1/2 of sec. 22, excluding that portion contained in lot 2, U.S. Survey No. 3177, by quitclaim deed dated April 15, 1966. This conveyance was subject to existing easements, recorded and unrecorded, for public roads and highways. While Road 1, AA-2839, was not noted on the survey plat until 1968, the record states that it is one of several roads "constructed by the Air Force during the 1950's and early 1960's." If Road 1, AA-2839, is a segment of an existing road extending to the Naknek Road, the conveyance to the State might well be subject to that road and the public right of access associated with the reservation in the deed.

We find it unnecessary to ascertain in further detail the current status of the easements for roads constructed on land patented to the State. The easement reservation in the decision appealed from does not purport to alter that status, but rather to recognize an easement for an existing road previously noted to the public land records pursuant to Instructions, supra. BLM has an obligation to route an easement for public access around private inholdings where it is feasible and where it is necessary to ensure the right of access. See State of Alaska, 74 IBLA 275 (1983). However, we do not find that to be the case here where the easement merely reflects recognition of

fn. 10 (continued)
the principles of Instructions, supra, and not the underlying land, would be retained as a Federal interest. See Doyon Limited, 5 ANCAB 77, 87 I.D. 480 (1980).

an existing road noted to the public land records under 44 L.D. 513 and the record does not indicate that it would be inadequate to provide public access across the land conveyed to the Native corporation.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN CONCURRING:

I concur with the result in this case because I think it is a reasonable interpretation of "actual use," though not one that is commanded by any expression of the intent of Congress in enacting section 3(e) or of the Department in promulgating the regulations implementing that section. It seems to me equally reasonable, and far more realistic as a matter of the administrative steps Federal agencies must go through before they can actually begin to use land for a particular purpose, to interpret "actual use" to include the kinds of steps undertaken by the FAA in 1967 so long as the land continues to be effectively dedicated to the purpose for which the planning, budget-preparing, designing, and related administrative steps are initiated. While I agree that a statement that an agency merely plans to use some land, some how, some time in the future should not be deemed "actual use," in this case we have a series of continuous and observable activities leading to the use of the land for housing: a master plan for King Salmon, including the housing site involved in this case, was prepared in 1967; approval of this plan by the Director of the FAA's Alaskan Region was given in 1968; budget proposals were submitted by the field to Washington in January 1971 when the housing projects in Alaska became a high enough agency-wide priority; justifications for Congress to appropriate the funds were submitted by the Department of Transportation in 1972; then, after the appropriations were made in August 1972, contracts for the design of the housing were prepared. All during this period the land was set aside by the FAA for the housing that was eventually constructed in 1974 after all the necessary preliminary steps had been gone through. I think it reasonable, where the land has been continuously and effectively committed in this way, to consider that the agency has had it in "actual use." 1/

The difficulty is that the preambles to the proposed and final regulations do not discuss whether such activities should be regarded as "actual use." The only comment that mentions "Proposed or future use" occurs in the context of when actual use must occur, not in the context of defining what the nature of actual use is. So there is no basis for knowing one way or the other what the regulation writers would have written had they considered the circumstances of a case like this. Nor is there any specific legislative history: although the conference committee deleted the word "improved" from the language of section 3(e) that read "improved land actually used," that deletion only indicates that improvements are not necessary to find actual use, it does not define what scope Congress intended "actual use" to have.

So whether "actual use" should be interpreted to include activities such as the FAA conducted in preparation for its housing is a matter of policy better dealt with if BLM decides to revise the regulations implementing

1/ Cf. People, By and Through Department of Transportation v. Sullivan, 144 Cal. Rptr. 100, 101 (1978). (Although property condemned by Department of Transportation remained in its precondemnation condition, the property had nonetheless been "used" for its intended purposes where the purpose of the condemnation was to provide a relatively secure slope adjoining the highway.)

section 3(e) or if the Secretary of Transportation decides to request Secretary of the Interior to take jurisdiction of this case in accordance with 43 CFR 2655.4(a).

Will A. Irwin
Administrative Judge